United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7346

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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LOCAL 32B, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Plaintiff-Appellant,

-against-

SAGE REALTY CORP., THE WILLIAM KAUFMAN ORGANIZATION, ROBERT KAUFMAN, MELVYN KAUFMAN, ALLIED MAINTENANCE CORP. and PRUDENTIAL BUILDING MAINTENANCE CORP., LOUIS FEIL, WILLIAM KAUFMAN,

Defendants-Respondents.

- x

Bp/s

Docket No. 75/7346

MEMORANDUM OF LAW

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UNITED STATES COURT OF APPEALS
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LOCAL 32B, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, Plaintiff-Appellant, -against- SAGE REALTY CORP., THE WILLIAM KAUFMAN ORGANIZATION, ROBERT KAUFMAN, MELVYN KAUFMAN, AL[illegible]AINTENANCE CORP. and PRUDENTIAL [illegible]NG MAINTENANCE CORP., LOUIS FEIL, WILLIAM KAUFMAN, Defendants-Respondents.	Docket No. 75/7346

BRIEF OF PLAINTIFF-APPELLANT

QUESTIONS PRESENTED:

1. Should the Court below have found probable cause to issue a preliminary injunction pending arbitration, under the rule requiring unequivocal notice of withdrawal prior to negotiation of a collective bargaining agreement with a multi-employer association in order to relieve an employer from the binding effect of the agreement, when an agent of the employer-owner of a building, who is a disclosed principal, had executed as agent the membership application in the association for a specific building address in question together with a collective bargaining agreement naming the owner, and the agent is dismissed prior to negotiations

for the successor agreement, but no notice of such agent's dismissal or of withdrawal from the association (or of claimed non-membership of the principal as a result of the dismissal) is given to the Union prior to execution of the agreement?

2. Should the District Court have found probable cause to justify such a status quo preliminary injunction preserving the jobs and working conditions of employees pending arbitration, where such a collective bargaining agreement provides that upon a change of building cleaning contractors (not managing agent), performing covered work, the successor contractor must employ the employees then employed on the job site upon the same contract terms?

3. If such a status quo preliminary injunction is justified, should the injunctive order require the employer-principal to refrain from engaging or continuing any successor contractor which declines to maintain such status quo conditions pending arbitration?

4. May such a preliminary injunctive order direct immediate arbitration where the issues are clear and unambiguous and the award (a) might finally dispose of the entire case on the merits prior to trial; (b) be an aid to the Court in construing any disputed provisions of the agreement; and (c) be expeditious and relatively inexpensive?

STATEMENT OF THE CASE

This is an appeal fron an order of Judge Lee P. Gagliardi in the Southern District of New York dated June 13, 1975, denying a preliminary injunction in favor of plaintiff seeking to restrain defendants, pending arbitration pursuant to a collective bargaining agreement, from permitting or requiring any building service or maintenance contractor from dismissing any of the former work crew from their employment in two New York City office buildings; from permitting such contractor to perform such services unless and until such contractor employs the full complement of such employees at such buildings under the terms of the collective bargaining agreement; and directing defendants to proceed to arbitration pursuant to the collective bargaining agreement (moving affidavit of John Sweeney, p.8-9).

The action was commenced by the filing of a summons and complaint with the proposed temporary restraining order and motion for such injunctive relief on May 28, 1975. The summons and complaint establishes the jurisdiction of the Court pursuant to Section 301 of the National Labor Relations Act (NLRA), 29 USC §185(a).

Plaintiff is a labor organization representing approximately 45,000 building service workers in the City of New York; it negotiates master collective bargaining agreements with an association of employers, the Realty Advisory Board on Labor Relations, Inc. (hereinafter "RAB") covering a majority of its members.

The Court below denied the injunction primarily upon the conclusion that defendants were not bound as members of the RAB, when the collective bargaining agreement, effective January 1, 1975, was negotiated between plaintiff (hereinafter "Local 32B") and the RAB on behalf of its members, on the ground that the membership in the association by defendants' managing agent for the two buildings did not bind the principals, but only the agent, upon the Court's view of the proof at the evidentiary hearings (May 30, June 5 and June 6,1975). On June 16, 1975, Local 32B appealed to the Court of Appeals and Judge Gurfein signed an order to show cause with a temporary restraining order, setting down for argument on June 17, 1975, the plaintiff's simultaneous motion for an injunction pending appeal. On June 18, the Court of Appeals issued its decision denying that preliminary injunction upon the ground that to exclude the successor contractor from the premises would endanger public health, but restraining defendants pending this appeal from treating as permanent its contractual arrangement with a successor contractor, pending a determination of the appeal on the merits; and because of the far-reaching importance of the case based on the common practice of the RAB handling labor relations with Local 32B in behalf of managing agents, directing an expedited appeal during the week of June 23,1975.

The two office buildings involved in this proceeding are 77 Water Street, owned by defendant Robert Kaufman and another

as co tenants, and 127 John Street, owned by defendant Melvyn Kaufman and another co-tenant. Both buildings are leased to defendants William Kaufman and Louis Feil. Both properties are operated through defendant Sage Realty Corp. ("Sage"). William, Robert and Melvyn Kaufman and Louis Feil are hereinafter referred to collectively as "Owners". Sage and Owners are hereinafer referred to collectively as "Operators". William, Robert and Melvyn Kaufman adopted the use of the name of defendant "The William Kaufman Organization"; they are also stockholders and officers of Sage (Tr. pp. 39-44, 59-61).

Sage, in about 1970, engaged as managing agents for both buildings, the firm of Cushman & Wakefield (which, in turn, had two subsidiaries, at first, Property Maintenance Corp., and later, Cushfield Maintenance Corp. (Tr. p.43-44, Ex.G*); (all three companies hereinafter designated "C & W"). C & W continued in that capacity until approximately September 1, 1974, when Sage itself replaced them (Tr. pp. 42-44, 65-66, Ex.G). Defendants Allied Maintenance Corp. and Prudential Building Maintenance Corp. are building cleaning and maintenance contractors engaged for several years, until May 31, 1975, to clean and maintain 77 Water Street and 127 John Street, respectively (Tr. p. 44-45).

There is no testimony whatever in the record that Local 32B ever received notice of the termination of C & W as managing agent prior to January 23, 1975; there is no testimony in the record that Local 32B received notice of any withdrawal or

*Exhibits submitted by plaintiff are designated by numbers; Exhibits submitted by defendants are designated by letters.

a claim of non-membership in the RAB with respect to the two office buildings prior to January 23, 1975, three weeks after the conclusion of the RAB-Local 32B negotiations (Tr.p.35-38, Exs. 7, 11 and 12). The first such notice received was dated January 23, 1975 (Ex. 7).

Membership in the RAB is by application for each separate building (Tr. pp.270-272). See also Exhibit 10, Article X, providing for new members, a thirty day option to adopt for "any loft or office building", thus avoiding individual bargaining with the Union (moving affidavit of John Sweeney, pp. 4 and 7). The contract between Sage and C & W, in evidence as Exhibit G, contains certain significant provisions (the Exhibit relates to 77 Water Street and the change notations, as testified by a Vice President of C & W, represent the text of the otherwise identical agreement covering 127 John Street, Tr. p.282-283):

(a) The first paragraph and introductory provision of the second paragraph provide for the engagement of C & W as managing agent and that C & W, "subject to the control of Sage", is to render and perform certain services.

(b) Paragraph Second (d) provides that C & W may enter into contracts for services, subject to Sage's approval, in either Sage's or the agent's name, as the agent shall elect.

(c) Other provisions of paragraph Second provide that the agent will cause to be hired persons necessary to maintain

and operate the bulding as agent's employees, but that Sage is to render monthly statements supported by disbursement vouchers (Second (j)), including the agent's compensation, severance, hospitalization, insurance, pension and other payments required under "any union contract" and that twice a month the agent is to remit to Sage all rents collected by C & W, less disbursements.

(d) Paragraph Third provides that all funds collected by the agent for the account of Sage are to be deposited in a bank designated by Sage and the funds kept in a separate account for Sage.

(e) Paragraph Fourth is a hold harmless clause conforming to the customary principle of exoneration of agents by principals; paragraph Ninth requires approval by Sage of all changes in operating policy; paragraph Eighteenth provides that agent's subsidiaries are deemed agents as well.

(f) Paragraph Nineteenth clothes the agent with general authority and power "necessary and advisable" to carry out the intent of the agreement, and, in this respect, the provisions of Second (j) (supra) relating to payments under "union contracts" should be noted.

The agent joined the RAB for the premises 77 Water Street and 127 John Street in each case as "agent" for the premises (defendants' Exs. D and E, Tr.p. 272).

The contract provision (in Second (j)), requiring submission of itemized expense sheets, including payment of RAB dues

by the agent, was observed in practice (Tr.pp.312-318, testimony of Sage's Controller, Braunstein).

In 1972, having previously joined the RAB (Exs. D and E) as "agent" for the premises 127 John Street and 77 Water Street, C & W entered into agreements with the Union (Exs. 3 and 6). Thereafter, C & W paid wages, pension, welfare and other Union obligations for employees, and dues to the RAB, and perforce, reported the same on the itemized vouchers required under Exhibit G to Sage. Sage was therefore clearly on notice of building service employees' coverage by the Local 32B contract.

After conclusion of the 1975 RAB-Local 32B Commercial Building Agreement on January 2, 1975 (Tr.pp.36-38, Ex. 12) and the first notice to Local 32B of the Operators' claim of non-membership in the RAB three weeks later, on January 23, 1975(Ex. 7), notice was given to Prudential and Allied in May 1975 of their termination as cleaning contractors of the two office buildings as of May 31, 1975 by the Operators (Tr. p.44-45, Exs. F and G of moving affidavit of John Sweeney).

The collective bargaining agreement (Ex. 10, Art. I) requires three weeks' notice from the owner of the name of a successor contractor, that the owner require the successor contractor to hire the work crew then employed, and adopt the terms and conditions of the collective bargaining agreement. When the Operators defaulted in giving such notice, which should have been

mailed no later than Monday, May 12, 1975, the Union, on May 16, wrote demanding the name of the new contractor(s) (moving affidavit of John Sweeney, Ex. H) and also compliance with the provisions of Article I, and a meeting to discuss subcontracting and job security, as step one of the grievance procedure. When no response was received by Wednesday, May 21, the Union wrote again on May 21 (Sweeney affidavit, Ex. I), demanding that the employees on an annexed list be deemed to have applied for employment with the successor contractor(s). Receiving no response again, the Union hand delivered to the Contract Arbitrator, on Friday, May 23 (Sweeney affidavit, Ex. J), a request for arbitration, requesting a hearing "at the earliest possible date". The Arbitrator fixed a hearing for May 30, 1975 (Sweeney affidavit, Ex. K).

This action was commenced on Wednesday, May 28, 1975, and a temporary restraining order with a request for a stay and a preliminary injunction presented simultaneously.

The change in contractors was due on June 1, 1975, and a hearing on the temporary restraining order was scheduled before Judge Gagliardi for May 30; Judge Weinfeld had previously disqualified himself on the afternoon of May 28 and Judge Griesa, to whom the case had been permanently assigned, assigned the temporary restraining order and preliminary injunction application to the Part I Judge (Judge Gagliardi) on May 29, 1975. Judge Gagliardi

held the first hearing on May 30, 1975, and it was not until May 30, 1975, at this first hearing, that Local 32B learned the name of the successor subcontractor, Monahan Commercial Cleaners, Inc., during the course of defendants' testimony (Tr. p.45).

After a hearing on the temporary restraining order on May 30, Judge Gagliardi succeeded in effecting a voluntary arrangement for Local 32B employees, who reported, to be put to work (Tr. pp. 125-135). The arrangement was not fully followed in that most Local 32B members who reported (10 of 12 at 77 Water Street and 5 of 9 at 127 John Street) (Tr. pp. 195-230, 248, 250-262) were not put to work, but were told they would be paid if they reported. It is doubtful that plaintiff would have accepted the voluntary arrangement on this basis had they believed that members would not actually be assigned to work at their jobs, and furthermore that some of those who reported would be told by employer representatives that they had to join another union, Local 803, International Brotherhood of Teamsters, in order to be put to work (Tr. pp. 148-159, 164-165, 170, 203). No evidence was given, beyond statement of counsel, of the alleged Local 803 agreement, nor was a copy offered in evidence. It can only be presumed that the alleged agreement is the same agreement covering a third building, 747 Third Avenue, owned and operated by defendant Operators, where the National Labor Relations Board has now issued a complaint charging, inter alia, unlawful assistance to Local 803, which would render the contract invalid (Sweeney moving affidavit, Ex.E, Tr. p.112).

After service of the notice of arbitration (Ex. K to Sweeney affidavit), the owners and Sage each filed petitions in the New York State Supreme Court to stay arbitration, so that the arbitration could not proceed as scheduled on May 30, 1975. Both proceedings have been removed to the Southern District. Local 32B, respondent in these two actions, has filed its answers.

As of the third payroll week after June 1, 1975, that portion of the Local 32B crew that was not employed, a total of 17 out of 23 who reported, (Tr. pp. 195-230, 248, 250-262) are off the Monahan payroll and are unemployed. Others did not report, two because of illness, others possibly in the belief that there was little, if any, chance of employment, or because they were unwilling to work under the lower wages and conditions offered by Monahan (Tr. p.130).

Interstate commerce was stipulated at the evidentiary hearing (Tr. pp. 232-233 238).

Local 32B contends that Article I of Exhibit 10 requires the Operators to refrain from entering into a contract with any contractor, or successor contractor, who does not employ the original work force under the conditions of the RAB-Local 32B Commercial Agreement, and that pending arbitration of this clear and unambiguous requirement of Article I of Exhibit 10, a preliminary injunction should issue to this effect, also directing arbitration; such injunction to remain effective until a final award, and its enforcement in court if necessary, or until after trial on the merits of this case. It is also Local 32B's position that the

Operators were bound, in the absence of any notice whatsoever or claim of non-membership or withdrawal from the RAB, by the 1975 RAB-Local 32B Commercial Building Agreement through the membership of the two buildings in the RAB by their agent, C & W.

POINT I

THE MEMBERSHIP OF C & W IN THE RAB FOR 127 JOHN STREET AND 77 WATER STREET AS AGENTS OF THE OPERATORS IS BINDING UPON THEM; PROBABLE CAUSE EXISTS FOR THE ISSUANCE OF A PRELIMINARY INJUNCTION.

In the case of Howard Johnson Co. v. Detroit Joint Board, 417 US 249 (1974), involving successorship, the Supreme Court held that where a successor employer did not hire a majority of the work force, it was not bound to the agreement or to arbitrate; the remedy of the union lay against the predecessor employer which had not honored its obligation to require the successor to assume the agreement and employ the work force. It is for this reason that Monahan Commercial Cleaners, Inc., is not joined as a defendant in this action under Section 301.

The Supreme Court, in connection with the remedy available to the union, stated at footnote 3, as follows:

> "[3]The Union apparently did not explore another remedy which might have been available to it prior to the sale, i.e., moving to enjoin the sale to Howard Johnson on the ground that this was a breach by the Grissoms of the successorship clauses in the collective bargaining agreements. See National Maritime Union v. Commerce Tankers Corp., 325 F. Sup. 360, 76 LRRM 2692 (SDNY 1971), vacated, 457 F. 2d 1127, 79 LRRM 2954 (CA2 1972)."

Such relief was granted in Amalgamated Food Employees Union Local 590, Amalgamated Meat Cutters, Butcher Workers of North America, AFL-CIO v. National Tea Company, 346 Fed. Sup. 875, 81 LRRM 2027 (D.C. Pa., 1972)

In the National Tea case, the court decided that, under Section 301 of the Labor-Management Relations Act, a union is entitled to a preliminary injunction requiring the employer to arbitrate a dispute involving termination and locking out of employees covered by the collective bargaining agreement, and forbidding the employer, pending arbitration, to consummate an agreement for a sale or transfer of its business that did not contain a clause making its contract with the union binding upon the successors and assigns; it appeared that the union was likely to succeed in its contention that its claims were subject to arbitration, and the dispute involved job tenure, seniority rights and the applicability of a successors and assigns clause of the agreement; threat of immediate loss of jobs and wages was found to constitute a situation in which there is no adequate remedy at law, and the employer, in turn, would not suffer irreparable harm.

Under Federal labor law, the National Labor Relations Board has treated separate entities, such as the Operators, as a single employer for purposes of the Act. Carol Management Corp., 133 NLRB No. 1126, 48 LRRM 1782 (1961).

In 1947, the Taft-Hartley Law for the first time intro-

duced the term "agent of an employer" as part of the Act.

Section 2(2)* provides:

> "(2) The term 'Employer' includes any person acting as an agent of an employer, directly or indirectly, ..."

Section 2(13)*, as well as Section 301(e)** provide as follows:

> "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

In connection with the enactment of these two provisions of the Labor-Management Relations Act into the Taft-Hartley Law in 1947, the stated purpose of the Congress for these changes was to make unions and employers subject to "the ordinary common law Rules of agency."

> House of Representatives Report No. 510
> 80th Congress, First Session 36 (1947)

See also: Samoff v. Highway Truck Drivers Local 107
355 Fed. Sup. 505 (D.C. Pa, 1973)

The Restatement of the Law of Agency (Second) contains relevant provisions: Section 14(n) states:

> "One who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also is an independent contractor."
> (Emphasis added)

Section 320 of the Restatement states:

> "Unless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal, does not become party to the contract."

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*29 U.S.C. §152(2),(13). **29 U.S.C. §185(e).

To the same effect, In re Brown, Harris, Stevens, 59 LRRM 2941 (1965, not officially reported), aff'd. 272 N.Y. Sup. 2d 697 (App. Div., N.Y. Sup. Ct., 1966).

Under the management agreement, defendants' Exhibit G, summarized in part at pages 6-7 above, C & W was clearly an agent for a disclosed principal and is not bound by its contract as agents for its principal, but the Operators, who were the principals, are clearly bound by the acts of C & W.

Defendants have sought todistinguish the Brown, Harris, Stevens case upon the ground that the employees were not found to be employees of the principal. It is submitted that this distinction is immaterial and a mere matter of form. Here, C & W's agreement provided that C & W pay the employees out of rent monies collected and remit the balance to its principal, Sage. In either case, Local 32B would have no way of actually knowing of the private arrangement between the principal and agent. It follows that prevailing Federal law in the area of association membership should preclude any requirement on the part of the Union to examine into the minutiae of the principal-agent relationship. If the terms of the Sage-C & W agreement are relevant, it is submitted that Section 14(n) of the Restatement of the Law of Agency (Second), supra, would adequately cover this type of situation since one may be both an independent contractor and an agent simultaneously. It is submitted that the universal law concerning timeliness of

withdrawal from the employer association should be the governing principle in this case. The rule requires (a) unequivocal (b) written notice (c) to the union (d) prior to the commencement of negotiations, to effect a timely withdrawal in support of an employer's claim that it is not bound by the association agreement.

Courts have repeatedly held that their determinations with respect to obligations under multi-employer collective bargaining should be in accord with the determinations of the National Labor Relations Board in this area. Thus, in Lewis v. Cable, 107 Fed. Sup. 196 (West. Dis. Pa., 1952), the District Court held that the defendant employer's defense that it did not intend to ratify an association collective bargaining agreement was untenable, and that the employer association had the authority to enter into the agreement.

In Lowe v. O'Conner, Montana Supreme Court, 515 Pac. 2d 677, 84 LRRM 2634 (1973), the Court held that the withdrawal of an employer from an association was ineffective under federal law, 29 USC §185(a), Taft-Hartley Law §301, citing the leading decision of the NLRB, Retail Associates, Inc., 120 NLRB 388, 41 LRRM 1502, 42 LRRM 1548 (1958), in which the Board firmly established the policy of refusing to permit the withdrawal of an employer from a multi-employer unit except on written notice prior to commencement of negotiations.

The NLRB and the courts have followed the Retail Associates case consistently; Sheridan Creations, Inc., 357 Fed. 2d 245 (CCA 2, 1966), cert. den. 385 US 1005 (1967); NLRB v. Jeffries Banknote Co., 281 Fed. 893 (CCA 9, 1960); Detroit Newspaper Publishers Association v. NLRB, 372 Fed. 2d 569 (CCA 6, 1967).

Refusal to sign the agreement following untimely withdrawal also violates the Act. Cosmopolitan Studios, Inc., 127 NLRB 788, 46 LRRM 1103 (1960).

In the instant case, we have C & W's notice to the Union (Ex. 3 and 6) in 1972 of coverage by the agreement then in effect (Ex. 11), and not a scintilla of evidence of any notice to the Union of withdrawal from the association with respect to the two buildings, termination of C & W as agent, or of any claim of non-membership with respect to the two buildings prior to January 23, 1975, three weeks after the conclusion of the 1975 agreement (Ex.7). No evidence was offered that the Union had any knowledge of the form of membership for the two building or of the contents of the agency agreement, Exhibit G.

Considering the practice in the industry of Local 32B-RAB bargaining through managing agents, as noted by the Court of Appeals in its decision on the motion for a preliminary injunction before this Court, the notice of membership in 1972 (Exs. 3 and 6), followed by the only other notice of non-membership on January 23,

1975 (Ex. 7) should be sufficient to determine that under applicable Federal law, the Operators did not meet the standards required for a timely withdrawal.

In the course of testimony, the Operators attempted to establish non-membership after the dismissal of C & W at the end of August 1974 as a termination of membership for the buildings upon the ground that the Operators had no notice from their own agent, C & W, of membership in the RAB. We submit that failure of an agent to give notice to its principal does not remove the case from the timely withdrawal rules. In any case, the non-notice position taken by the Operators is demonstrably untrue. The Operators' witness, Shearer, a C & W vice-president, testified that he did not notify Operators, but could not say that his predecessor until November 1974, Mr. Maguire, had not notified Operators, or that any other official of C & W had not done so (Tr. pp. 273-275). Mr. Maguire signed the original assents and membership applications for the RAB (Exs. 3 and 6, D and E). Shearer's valueless testimony as to non-notice to the Operators was never confirmed by witness Robert Kaufman in his testimoney, or by any representative of the Operators, and is clearly contradicted by the testimony of Sage's own Controller, Braunstein (Tr. pp. 313-318), who testified that Sage received itemized bills from C & W to justify its reimbursement of itself for dues payments to the RAB (Exs. H and I). This is a requirement under C & W's agency contract (Ex. G, paragraph Second(j)). Furthermore,

despite the alleged "inadvertence", Sage itself made the dues payments for each building for a six-month period through February 1975 to the RAB (Exs. 1, 2, 4, 5, 8 and 9). In fact, counsel understood an objection to the reference to inadvertence to have been sustained by the Court (Tr. p. 317, l. 12-15).

Even Robert Kaufman is shown to have regarded the acts of C & W as acts of the Operators. Thus, he testified (Tr. pp. 44-46) that C & W engaged Prudential and Allied; but he later testified (Tr. p. 289) with reference to the providing of building service and maintenance work, as follows:

> "Q. In fact, did you have contracts with cleaning contractors who provided that service?
>
> A. We had contracts with cleaning contractors and with others." (Emphasis added)

The notices of cancellation of Prudential and Allied (Sweeney's moving affidavit, Exs. F and G) indicate cancellations in the name of both the owners and Sage.

Finally, Owners' witness, Shearer, C & W's Vice President, testified (Tr.p.271) that C & W had no collective bargaining agreement with Local 32B for the two buildings, leading to the inference that C & W's execution (Tr.p.275) of Exhibits 3 and 6 were intended to be in the name of the Owners, mentioned therein.

Operators should not be heard, in light of their complete failure to give notice of the alleged withdrawal of the buildings from the negotiating group, the clear impact of the agency agreement, their obvious knowledge, as sophisticated businessmen, of their coverage by, and the terms of the RAB-Local 32B Agreement, and their conduct confirming in many respects their responsibility as principals for C & W as agents, now, after learning of the

terms of the RAB-Local 32B Agreement, to disclaim membership, ex post facto. The Union had a right to assume, when dealing with a managing agency firm as prominent as C & W, which discloses its principal as "Owner" (Exhibits 3 and 6), that such a firm is acting pursuant to an authorized agency when indeed such is the fact. The use of the word "Employer" as in Exhibits 3 and 6 may imply that the employees are carried on the Managing Agent's payroll. Such a fact is not determinative, since it is only one of many provisions of the Agency Agreement (Exhibit G) which clearly establishes general agency authority for operating the building, as a fiduciary. Under clearly defined federal law, the issue of notice is, however, determinative. Here, the agent, as "agent", gave notice in 1972 by Exhibits 3 and 6 of membership of the buildings in the RAB bargaining group and their coverage by the contract, describing its principal "The William Kaufman Organization" as "owner" and no further notice was received from agent or principal. Assuming arguendo, that even a notice of change of agents had been given, it is submitted that this would not suffice unless accompanied or followed by a timely notice that the owner regarded the buildings as withdrawn from the association bargaining group at the time of the change in agent from C & W to Sage.

As stated, this Court has observed in its decision with respect to the preliminary injunction pending appeal, the practice

in the industry of Local 32B-RAB bargaining through managing agents. In Farr v. Newman, 14 NY 2d 183, 250 NYS 2d 272 (1964), the New York Court of Appeals stated, quoting Holmes, Agency, 5 Harv.L.Rev. 1, reprinted in Holmes, collected Legal Papers [1952 ed.] 31:

> "If, under the circumstances known to him, the obvious consequence of the principal's own conduct in employing the agent is that the public understand him to have given the agent certain powers, he gives the agent those powers."

On this question of apparent authority, the Second Circuit stated in Masuda v. Kawasaki Dockyard Company, 328 Fed. 2d 662 (CA2, 1964):

> "Implied authority may be viewed as 'actual authority given implicitly by a principal to his agent' or as a 'kind of authority arising solely from the designation by the principal of a kind of agent who ordinarily possesses certain powers.' Lind v. Schenley Industries, Inc., 278 F. 2d 79, 85 (3 Cir. 1960) (applying New York law). The general rule followed in New York is that 'an agent employed to do an act is deemed authorized to do it in the manner in which the business entrusted to him is usually done."
> (Emphasis added)

We again emphasize that Local 32B had the right to assume, when dealing with a well-known managing agency firm which discloses its principal as "owner" (Exs. 3 and 6), that such a firm was acting pursuant to an authorized agency.

The Kaufmans are highly sophisticated businessmen and real estate operators; they were aware of their commitment to RAB membership for their buildings by their agent, C & W (supra, pp. 8, 18-19); they withheld any notice until after the 1975 RAB-

Local 32B contract was concluded. They should now be estopped from claiming non-membership with respect to their buildings at the time of the conclusion of the 1975 RAB-Local 32B agreement and prior to January 23, 1975 (Ex. 7). The contract is, therefore, in effect.

POINT II

THERE IS IRREPARABLE INJURY, NO ADEQUATE REMEDY AT LAW, AND A STRONG PROBABILITY OF SUCCESS ON THE MERITS.

In the case of Amalgamated Food Employees Union Local 590 v. National Tea Company (supra), the Court, in a very similar situation, found that the Union was likely to succeed in its contention that its claims were subject to arbitration, and that the dispute involved job tenure, seniority and other rights; the threat of immediate job loss was found to constitute a situation in which there was no adequate remedy at law, and the employees, in turn, would not suffer irreparable harm. It is submitted that similar considerations are clearly applicable in the instant case where job loss in the present job market in the New York City area can spell disaster for a family, and where the sole question at issue

is who shall be employed, but the work can clearly be performed in the employer's behalf. Any financial loss involved resulting from the lower wages payable under another Union's collective bargaining arrangements with a successor contractor can adequately be protected by the posting of an appropriate bond. The Court, in National Tea, stated - in connection with a proferred defense of adequate remedy at law on the ground that the Arbitrator could enter an award for monetary damages, and that the defendant was a solvent corporation, able to pay - that jobs, pension rights, health insurance, and seniority rights were involved under the collective bargaining agreement so that monetary damages would not prove adequate, and that the expertise of the Arbitrator was required. The Court concluded that there is no adequate remedy at law where immediate loss of jobs and wages was involved and the issuance of a preliminary injunction pending the Arbitrator's Award was justified. The Court ordered prompt arbitration.

The Court, in National Tea, cited Brotherhood of Locomotive Engineers v. Missouri, Kansas, Texas R.R. Co., 363 U.S. 528 (1960), in which the issuance of an injunction was sustained by the Supreme Court where the issue of elimination of jobs was pending before the National Railroad Adjustment Board; the Supreme Court held that the lower court was correct in requiring maintenance of the status quo, and in considering the hardships which would arise, if the employees were required to await a decision, in the face of the harsh results of discharge from jobs long held. The Court

also cited United Steel Workers v. Blaw-Knox Foundry, 319 Fed. Sup. 636(DC Pa., 1970) where a preliminary injunction issued restraining the employer from reducing the number of employees pending determination of an arbitrator of its right to do so. The Court also cited Local Division 1098 v. Eastern Greyhound Lines, 225 Fed. Sup. 28 (DCDC, 1963), and IUE v. Radio Corporation of America (DCNJ, 1971), 77 LRRM 2201 (not officially reported).

It is apparent that where arbitration is provided, courts have generally deemed imminent loss of jobs, seniority, pension and welfare benefits, and dislocation to be a sufficient showing of imminent and irreparable harm outweighing the employer's interest in immediate change in its labor policies.

It is submitted that this is just such a case. Many employees are now off the payroll while their rights to their jobs, pursuant to the work preservation provisions of the subcontracting clause, are pending before the Court and Contract Arbitrator. The relief granted by preliminary injunction in the National Tea case was (1) that the defendants proceed to arbitration; (2) that defendants be enjoined and restrained from terminating or laying off any of the employees; (3) that defendants refrain, pending final binding arbitration, and final enforcement of the Arbitrator's Award, from consummating any contract for the sale of their stores covered by the labor agreement, which did not contain a clause making said provisions binding upon defendants' successors. The

preliminary injunction was to remain in effect until final and binding arbitration occurred and final enforcement of the Arbitrator's Award, in a court of law, if necessary, or until a final decree in the case at hand.

Defendants argued below that a statement by one of their counsel purporting to offer jobs to employees involved at other locations of Monahan reduces the impact of irreparable harm. However, this offer was not made by Monahan itself, which is not a party to this action, and it would have required the employees to become members of Local 803, IBT, at lower wages and fringe benefits (Tr. p. 300-303).

Counsel for Sage, making the offer in behalf of Monahan (Tr. p. 300), acknowledged that Monahan only has three locations. These locations are clearly the two buildings at issue, plus 747 Third Avenue.

Therefore, the only other location at which Monahan could possibly have offered them jobs was the premises 747 Third Avenue (Tr. p. 292-293), mentioned above, where Monahan had been operating under its contract with Local 803, and the National Labor Relations Board has issued its complaint of unfair labor practices seeking to set aside such contract as contrary to Sec. 8(a)2*of the National Labor Relations Act, among other relief. A lawful unfair labor practice strike by Local 32B is in progress at these premises, so that a job offer at 747 Third Avenue is

*29 U.S.C. §158(a)(2)

equivalent to no job offer at all.

Furthermore, it is submitted that such a job offer requiring employees to become members of the very labor union seeking to replace them at their present locations, atinferior terms and conditions of employment, would violate the employees' rights under Section 7*of the National Labor Relations Act. Employment would be required of them at a building at which the Union of their choice is conducting a lawful unfair labor practice strike, and by joining Local 803 as a condition of employment they would be surrendering their Section 7 rights. The court below at pages 300-301, apparently recognizing these problems, initially sought to preserve jobs for the employees at locations where they could remain members of Local 32B and keep the same wages and benefits. The response to this suggestion was (Tr. p.301):

"MR. DUBLIRER: That I cannot say, Your Honor."

At stake for the employees in the instant case are:

1. Their job tenure, since they may only be discharged for just cause under the Local 32B agreement by protection of their chosen representative (Article VI, Sec. 6 of Ex. 10).

2. Seniority for tenure purposes, as well as vacation and sick pay. (Article XIII and Schedule A, Sec. 3, General Clauses 10 and 12, pages 27, 41 and 42 ff of Ex. 10).

3. Hospital, welfare and insurance coverage (Article XI, pages 20 and 22, Ex. 10).

4. Pension coverage and rights now protected so carefully pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001, et seq. (Article XI, pages 22-25 of Ex. 10).

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*29 U.S.C. §157

5. Their salaries (Schedule A, Sec. 2, pages 32-33 and Table, page 57, of Ex. 10).

While it appears at first glance that the irreparable harm affects 17 to 19 unemployed persons, the truth is that similar irreparable harm is imminently possible, if not probable, with respect to thousands of other building service employees similarly situated. If a substantial percentage of owners now subject to the RAB 1975 agreement are advised by this Court that dismissal of their Managing Agent means that owners are not liable for acts of agents binding owners to the collective bargaining agreement, the results affecting the standard of living of many thousands of New York City's low paid families are incalculable.

We submit that there is a substantial showing of probability of success and irreparable harm. The application of fundamental Federal rules of unequivocal notice of withdrawal prior to negotiations, in conjunction with the common law rules of agency as outlined at POINT I (supra), lead inescapably to the conclusion that C & W had authority; that its acts bound its principals; that there was at all times the appearance of authority; and that no notice to the contrary at the time of the replacement of C & W by Sage was given to the Union. The probability of success in arbitration is also apparent, since it appears quite clearly that a change of subcontractor without assumption of the work crew and their working standards violates Article I of Exhibit 10.

The direction by preliminary injunction that arbitration proceed in the National Tea case, resulted from the showing of probability of success. The arbitration is prompt, efficient and inexpensive. It may be an aid to the court at a trial on the merits in construing disputed provisions of the agreement,e.g.,the applicability of National Labor Relations Act Sec. 8(e), which must be held in abeyance pending arbitration in any event, POINT III, D, infra. In the event any determination at arbitration requires court review, the proceeding would be consolidated with the trial on the merits herein, and be resolved simultaneously. It is submitted that a direction of arbitration by preliminary injunction is a viable and appropriate remedy.

POINT III

RESPONDING TO VARIOUS DEFENSES OF DEFENDANTS-RESPONDENTS IN THE COURT BELOW

A.

Counsel for Owners argued in the court below that injunctive relief was precluded by the decision of the Second Circuit in Hoh v. Pepsico, Inc., 491 F. 2d 556 (CA2, 1974). We submit that this defense is without merit for the following reasons:

1. In Hoh, the Circuit Court found a failure to conduct an evidentiary hearing, which factor is not present in the instant case.

2. In Hoh, the Court found laches by reason of the failure of the Union to seek expedited arbitration procedures, which the plaintiff in this case did seek (Pages 8-9, supra, moving affidavit of John Sweeney, Ex. J).

3. The Court found on balancing of the equities the Rheingold Brewing Company was seeking to shut down because of heavy financial losses; in the instant case, we have threatened loss of jobs in the case of a prosperous employer which intends to continue its business.

4. The Court found a lack of probability of success in the arbitration procedure itself which sought to prevent complete shutdown. In the instant case, the violation of the sub-contracting clause (Ex. 10, Art. I) by failure to offer employment to the existing work crew, is apparent on its face, and it would seem that on this issue success at arbitration must therefore be considered highly probable.

B.

Defendants-Respondents argued below that, despite Exhibits 3 and 6, there could have been no collective bargaining agreement because Operators had no employees. At the time of the 1972 collective bargaining agreement, C & W had employees in the building, despite the existence of subcontracts with Prudential and Allied (Tr. p. 271). Robert Kaufman later testified on cross-examination (Tr. pp. 304-310) that there were employees

on the C & W payroll into 1975 (Tr. p. 308) automatically picked up on the Sage payroll when C & W was succeeded by Sage. Exhibit I to the Sweeney moving affidavit (Tr. pp.256-258) shows that there were union members covered by the agreement with C & W, and later Sage. Sage, during early 1975, transferred them to the Prudential payroll, but as of the date of the 1975 collective bargaining agreement, January 2, 1975, these employees were on the Sage payroll and, therfore, subject to the subcontracting clause. Thus, contributions were made in their behalf to the "Building Service Pension and Welfare Funds" (Tr. p. 310). These are the funds to which contributions are required pursuant to the collective bargaining agreement, Exhibit 10, Article XI, Par. A. and B. Thus, if it is material or relevant, Sage had covered employees which it had picked up from the C & W payroll covered by the Pension and Welfare Fund into 1975, after the date of the execution of the collective bargaining agreement.

As an additional factor, it may well be that the fact that Sage picked up C & W's employees on its own payroll, also bound them to arbitrate this Section 301 action as a "Successor Employer" as well as C & W's principal.

John Wiley & Sons v. Livingston
376 US 543 (1964)

The Operators, as a group, can be said to be more strongly subject to the Wiley principle, since the Wiley case involved a merger with a new company, whereas the successorship

in the instant case is that of an agent back to its principal. Under the principles of Wiley, the extent to which the collective bargaining agreement's provisions continue applicable to the successor must be determined at the arbitration. Furthermore, considering the strict supervisory powers of Sage over C & W, pursuant to the provisions of the agency contract (Ex. G), the parties (C & W and Operators) may well be regarded as joint employers.

See: Greyhound Corp.
153 NLRB No. 118
59 LRRM 1665 (1965)

If this were found to be the case, C & W's actions were more than those of a mere agent, but those of an agent-principal combined.

In any event, and under any theory of law, it is submitted that the contract is in effect by reason of the buildings' membership in the RAB at the critical time.

C.

Counsel for the Owners argued below that certain provisions of the RAB By-laws, Exhibit F, tended to show that none of the defendants were ever "members" of the RAB.

The answers to these arguments are contained in POINT I of this brief, showing that membership through "agents" (Exs. D and E) for specific building addresses constitute membership in behalf of the Owners.

Reference to the By-laws establishes that a collective bargaining agreement becomes effective when the Board of Directors, by majority vote, approves it (Ex. F, By-laws Sec. 11). Article VI of

the Certificate of Incorporation, together with Article II of the "Constitution" of the RAB (Ex. F), provide for application for membership on behalf of a "building" and that the application designate who is to act for such membership "as its agent" in the affairs of the RAB. Similarly, Sec. 14 of the By-Laws again provides that membership shall be for a building by an owner or operator, indicating that the parties contemplated the binding of the building to collective bargaining agreements by an owner or agent. In the instant case, it was the "agent" (Exs. D and E).

The argument that Operators did not file a written assent to the new agreement is a form of circular reasoning; if the group agrees, each employer is required to sign; Cosmopolitan Studios, Inc., supra, P. 17.

Thus, in Kroger Co., 148 NLRB No. 69, 57 LRRM 1021 (1964) the Board found an employer bound by a multi-employer group agreement (even where there was a practice of separate negotiations for certain individual matters) over the employer's objection. The intention to be bound by group as opposed to individual bargaining was found to be paramount. The employer was found to be bound because a majority of the employer association had made the agreement with the union, despite the history of individual bargaining and adjustments in limited areas. In the instant case, this us butressed by the testimony of Owner's witness, Shearer, a C & W Vice-President, that it was the practice to proceed to arbitration in cases of employer-members of the RAB who were recalcitrent in

complying with RAB-Local 32B settlements (Tr. p.277-278).

When Sage dismissed its agent, C & W, effective September 1, 1974, it is not claimed that it either notified the RAB or the Union that it regarded this termination of the agency as constituting a termination of membership of the buildings. January 21 and January 23, 1975, were the first such notices to the RAB and then the Union, respectively (Exs. A, B and 7).

Further support of the intent to bind owners may be found in the provisions of the agreement itself as adopted by the agents. Thus, in Exhibit 10, Article X, Sec. 2, there are provisions for options by a successor in ownership or lease control to adopt the agreement within twenty days. No mention is made of a change in agents, indicating that the signatories themselves never regarded a mere change of agency as a termination of the agreement.

Similarly, Article XIV speaks of the liability of the last owner of the premises for payment of termination pay and accrued vacations to employees up to the date of transfer of title, with a lien on the condemnation award for amounts received by the "owner". The intent to bind owners, even though committed through agents, is clear.

It is submitted that the correct approach to this problem was found in the case of Pharmacists Union v. Lake Hill Drug Co., 55 LRRM 2844 (not officially reported, USDC, West Wash.,

1964) in which, while resolving a dispute as to the application of the by-laws of the association in favor of the union, in an untimely withdrawal case similar to the instant case, the court held that, either way, the controlling question was timeliness of withdrawal rather than interpretation of the by-laws. Thus the court stated:

> "Assuming arguendo, that the Court is incorrect in this regard and that defendants by their failure to pay dues, or otherwise, successfully withdrew from membership as far as the Society is concerned, was such withdrawal effective insofar as plaintiff union is concerned? ..."

The court found that under the NLRB's rules, the withdrawal was untimely and the National Labor Relations Board's withdrawal rules were applicable, stating:

> "This Court does just that. Whatever might be the situation in a contest between the defendant employers and the Society, the Court must and does adopt the requirements of the Board that to be effective as against the union, an employer's withdrawal must show an unequivocal manifestation of an intent to withdraw which must be brought to the union's attention in a timely manner." (Emphasis added)

Under this interpretation of the applicable law, the determination of the District Judge in the instant case that Sage's last dues payment through February 1975 was "inadvertent" would not be material.

D.

It was argued that provisions of Article I of Exhibit 10 violate Section 8(e)* of the National Labor Relations Act, and the anti-trust laws, by reason of a recent decision of the Supreme Court in Connell Construction Co. v. Plumbers Local 100, _____US_____, 43 U.S.L.W 4657, June 2, 1975, 89 LRRM 244 (1975).

The court below did not believe that there was any Sec. 8(e) problem involved (Tr. p. 98).

It is clear that Article I of Exhibit 10 is a proper "work preservation" and "union standards" clause not outlawed by Sec. 8(e). The Second Circuit has so stated in NLRB v. National Maritime Union (Commerce Tankers Corp.) (486 Fed. 2d 908, cert. den. 416 U.S. 970, 1974). In this case, the court held that a work preservation clause violates Sec. 8(e) only when it seeks to preserve work for union members in general, as distinguished from employees already employed at a particular job site. The court approved work preservation clauses of the type sanctioned by the Supreme Court in National Woodwork Manufacturers Inc. v. NLRB, 386 U.S. 612 (1967), where the work sought to be preserved is the work presently being performed by the very employees at the very job site covered by the agreement. Inthe instant case, Article I of Exhibit 10 applies only to "employees then engaged in the work which is contracted out" (Art. I, Sec. 4, second paragraph) and is a work preservation clause for employees "employed in a particular building" (Art. I, Sec. 6).

*29 U.S.C. §158(c)

Furthermore, in NLRB v. National Maritime Union, supra, the court approved "union standards" clauses, i.e., clauses which provide that when the jobs are preserved, the union standards in effect may also be preserved, as is required in Ex. 10, Art. I, Sec. 4, first paragraph.

What is prohibited in the language in the National Maritime Union case is a contracting clause which imposes union standards by limiting contracting to companies already under contract with the union. The court distinguished these from union standards clauses, stating as follows:

> "The latter (the unlawful type of clause) which permit unit work to be transferred to other employers only if they are under contract with the union, are usually held illegal..."
> (Matter in parenthesis and emphasis added)

It follows that the work preservation and union standards provisions of Exhibit 10 are lawful protective provisions, since Operators were free to contract to any company, including Monahan, if jobs and existing standards are preserved as required.

The case of Connell Construction Co. v. Plumbers Local 100, supra, is to the same effect. Not only does a clause which prohibits subcontracting only to union shops violate Sec. 8(e), but it may also violate the anti-trust laws; but the same distinction is made between those already employed in the particular work on the job site and other cases. Thus, the Supreme Court stated in its decision in Connell:

"We therefore hold that this agreement, which is outside the context of a collective bargaining relationship and not restricted to a particular job site...may be the basis of a federal anti-trust suit..."(Emphasis added)

The foregoing is to be contrasted with the language of Article I, Section 6 of Exhibit 10:

"6. This Article is intended to be a work preservation provision for the employees employed in a particular building..."

The distinction is clear. Where the job preservation and work standards preservation apply to employees already employed at a particular job site, it is lawful. Where the union seeks to extend its organizing interests beyond their present limitation, by restricting freedom of competition to union shops or other locations, or union members generally, there may be a violation of Sec. 8(e), the anti-trust laws, or both. The instant case is clearly confined to existing jobs at the same job site.

Furthermore, with respect to any alleged violation of Section 8(e), this Circuit has held that in cases where collective bargaining agreement provisions are alleged to violate Sec. 8(e) as a defense to a demand for arbitration, the question should be determined by the arbitrator in the first instance, since his expertise is required in the interpretation and application of the provisions of the agreement.

Optical Workers Union v. Standard Optical Co.
500 Fed. 2d 220 (CA2, 1974)

Thus, if the arbitrator were to construe the agreement so as to bring it within the restrictions of Sec. 8(e), such a

provision would fall; if the arbitrator's determination construes the contact in a manner which does not violate Sec. 8(e), the provision would presumably stand valid under the reasoning of the Optical Workers case, supra.

E.

Counsel for defendant Owners raise the question of laches as a possible defense to injunctive relief in this action, citing Hoh v. Pepsico, supra. It is submitted that the promptness with which the Union acted following first failure by Operators to comply with the notice provisions of the agreement, by a notice sent no later than May 12, 1975, naming the new contractor, obviates any claim of laches (supra, P.8-9).

The claim of laches in the Hoh case was based primarily upon the union's failure to seek expedited arbitration. In this case, the Union's request for arbitration (moving affidavit of John Sweeney, Ex. J) was hand delivered to the contract arbitrator, requesting a hearing "at the earliest possible date". The Union was required to exhaust the initial step of the grievance machinery, and had done so by its letter of May 16, 1975, requesting compliance with Article I, and a grievance meeting (moving affidavit of John Sweeney, Ex. H).

The court below rejected Operators' laches argument (Tr. p. 82).

CONCLUSION

It is respectfully submitted that the Court of Appeals should reverse the decision and order of the District Court, and direct entry of an order granting a preliminary injunction, enjoining and restraining Operators (defendants other than Prudential and Allied) pending the trial of this action and binding arbitration and/or final enforcement of the Arbitrator's Award in a court of law if it becomes necessary, from:

1. dismissing, or permitting or requiring any contractor to dismiss, from their employment, any employee employed as of May 30, 1975, as a building service or maintenance worker at the premises 77 Water Street in the City, County and State of New York, and 127 John Street, in the City, County and State of New York;

2. engaging any building service or maintenance contractor, or permitting any building service or maintenance contractor to undertake or continue cleaning services or maintenance work at the premises 127 John Street or 77 Water Street, in the City, County and State of New York, unless and until such contractor employs the full complement of building service and maintenance employees at said premises as of May 30, 1975, upon the terms and conditions set forth in the 1975 RAB-Local 32B Commercial Building Agreement;

and further

3. directing said defendants to proceed promptly to arbitration before George Marlin, Esq., Contract Arbitrator, on such date as such Arbitrator may fix by notice to the parties;

and that the Court grant appellant such other and further relief as may appear just and proper in the circumstances.

Respectfully submitted,

ISRAELSON & STREIT
Attorneys for Plaintiff-Appellant

Counsel:

Arnold R. Streit
Allen S. Mathers

SERVICE OF A COPY OF THE WITHIN MEMORANDUM OF LAW IS HEREBY ADMITTED.

dated: 6/30/75 - 3:04 PM

COPY RECEIVED

for Defendant Sage Realty Corp.

BY:

dated: 6/30/75

ROSENMAN COLIN KAYE PETSCHEK FREUND & EMIL
575 MADISON AVENUE
NEW YORK, N. Y. 10022 by BCR

for Defendants William Kaufman Organization, William, Robert and Melvyn Kaufman, Louis Feil

dated: 6/30/75

for Defendant Allied Maintenance Corp.

dated:

for Defendant Prudential Building Maintenance Corp.

COPY RECEIVED
June 30, 1975

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

Attorney(s)